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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

DEC 20 1993

In the Matter of ) MM Docket No. 93-254  
)  
Limitations on Commercial Time on )  
Television Broadcast Stations )

TO: The Commission

### COMMENTS OF MILLER BROADCASTING, INC. (KMCI-TV)

Miller Broadcasting, Inc. ("Miller" or "KMCI"), licensee of television broadcast station KMCI (Channel 28), Lawrence, Kansas, submits these, its Comments, in the captioned proceeding designated Notice of Inquiry.

#### I. Background

Miller has operated KMCI since it first went on the air in 1988, as an independent, non-network station. It broadcasts programs in the public interest, responsive to issues of significance; and children's programs, most favorably received by viewers in the Lawrence community and the surrounding area. Additionally, KMCI airs the programs of Home Shopping Network (HSN). The station is now emerging from Chapter 11 bankruptcy proceedings.

As an affiliate of HSN, KMCI is vitally interested in the matters raised by the captioned Notice of Inquiry. Understandably, KMCI is opposed to any changes in Commission rules and/or policies that would restrict or significantly modify its present operation as an HSN affiliate.

In plainest terms, without the benefits - principally financial - accruing to Miller as an HSN affiliate, it would in all likelihood go dark, thus depriving viewers of Lawrence and its surrounding area of a unique service now enjoyed over the air and by cable carriage throughout a portion of eastern Kansas.

## II. Comments of Miller

The matter of commercialization of TV stations was exhaustively explored by the Commission some few years ago by Notice of Proposed Rule Making in MM Docket 83-270, 94 FCC 678 (1983), 48 FR 37239 (August 17, 1983). The Commission commenced a far-reaching proceeding involving not only TV commercialization, but also program "guidelines", ascertainment of public needs, the keeping of program logs, and revision of the basic application form. A Report and Order released August 21, 1984, 98 FCC 1076 (1984) dealt with each sub-topic of television licensing and operation.<sup>1</sup>

The present Notice of Inquiry revisits only the matter of commercialism by TV stations. The conclusions of the Deregulation Order dealt with the state of the art of ten years ago, and the present inquiry must consider developments over the past ten years as they impinge on present television station operation and the climate of television-information services since 1984. Chairman Quello observed in his separate statement to the Notice of Inquiry:

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<sup>1</sup> Deregulation of Commercial Television, hereafter cited as "Deregulation Order".

I support this Notice not because I believe that the Commission should alter its previous conclusions, but because the Communications Act assumes that the FCC will continue to reevaluate the meaning of the phrase "public interest, convenience and necessity".

\* \* \* \*

Consequently, I believe the Act directs the FCC to gauge the public interest by looking to the future, not the past.

Thus, the Commission's reasons for abandonment of commercial guidelines in 1984 need only be updated in light of technical and economic developments over the past decade.

In its Deregulation Order, the Commission concluded:

58. The record in this proceeding provides convincing evidence that marketplace forces can better determine appropriate commercial levels than our own rules.

#### Channel Scarcity No Longer A Serious Consideration

Reexamining the need for "commercial guidelines" (i. e., restrictions), the Commission in 1984 opined:

The Commission's concern with commercial practices has been shaped by two primary considerations: the desire to prevent the abuse of scarce broadcast resources through excessive commercialization, and a reluctance to adopt rigid quantitative standards. (Deregulation Order, par. 20)

What the Commission envisioned as beginning or "just beginning" in 1984 have now become realities - and more. Over-the-air television has unhappily suffered the competition of proliferating MDS, SMATV, LPTV, MDS and IFTS. DBS operations are scheduled to commence in 1994. Of even greater importance is the explosion of cable television services, both through the carriage of over-the-air television signals and cable-originated

programming. Two- and three-tier cable services and pay-per-view have emerged and achieved a serious position in the marketplace of home communications. The recent spate of telco and cable system mergers has yet further expanded the sources of transmittable information and the promise of "500 channels," now looming on the horizon may become a reality in the immediate future.

Thus the spectre of "scarce broadcast resources" has been reduced in importance so as to be a de minimus factor to be considered by the Commission in connection with home shopping programming.

#### Marketplace Conclusion of 1984 Remain Valid

The underlying criterion employed by the Commission in deregulating television stations has been reliance upon the marketplace rather than "the adoption of rigid quantitative standards." Nor has any serious impediment arisen to disturb that judgment. KMCI has striven to fulfill and indeed has fulfilled specifically all of its public interest requirements as outlined by the Commission<sup>2</sup> and must sink or swim solely on the basis of its acceptance in the marketplace.

As the Commission will recognize, it is axiomatic that all television stations are basically business ventures and survive only through public acceptance of the programming they are able to

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<sup>2</sup> It may be observed parenthetically that these are no more and no less than those imposed on television stations that do not participate in home shopping programming.

air. If a station lacks popular or acceptable programming, it accordingly lacks viewers, and thus is shunned by advertisers and is unable to afford programming that will attract viewers. This circular reasoning is well known to the Commission. It is indisputable that popular programming is a sine qua non of a successful television station operation.

KMCI has enjoyed and continues to enjoy wide popular acceptance of its HSN programming. Its loyal coterie of viewers accepts and obviously appreciates the shopping opportunities offered. If it did not, KMCI would not have survived economically and very probably would have gone dark. Its acceptance by the viewing public attests to the service in the public interest that KMCI provides.<sup>3</sup> Were the Commission to remove or restrict HSN-type of programming, it would deprive the public of a segment of television fare that it has enthusiastically received and economically supported.

#### Response to Commission Questions

At paragraph 8 of its Notice of Inquiry, the Commission has posed several questions for respondents. Miller respectfully addresses them.

1. Any strict rule setting specific limits on commercial material to be aired by television stations would be contrary to the public interest. Restrictions on home

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<sup>3</sup> The situation is akin to violence and mayhem on television; everyone deplores it except the millions of viewers who watch it, so it continues, on one nightly show after another.

shopping stations will result in their demise, thus depriving the public of a popular, much-appreciated and much-viewed service. In its Report and Order in MM Docket No 93-8, the Commission determined that HSN stations operated in the public interest (and were entitled to must-carry status); nothing has changed since release of that R&O.

2. Since Miller urges that no commercial restrictions be again placed on television stations, the matter of hourly or longer restrictions becomes moot.

3. Existing stations, including KMCI, adequately and consistently fulfill their public interest obligations under the present freedom from commercial restrictions, therefore no need exists for "greater flexibility" in fulfilling public interest obligations by television licenses and "informal processing guidelines" would be unnecessary.

4. Since Miller feels that no limits should be imposed on commercialism by television stations, efforts to ensure compliance with "any limit on commercialism" would be moot.

5. First Amendment considerations have achieved greater importance since issuance of the Deregulation Order 10 years ago. As the Commission has pointed out in its Notice, the Supreme Court admonished that government regulations not "place too much emphasis" or a

distinction between commercial and non-commercial speech, citing City of Cincinnati Network, Inc. v. Discovery Network, Inc., No. 91-1200, slip op. at 14 (U. S. March 24, 1993). That decision should be read in conjunction with Action for Children's Television, \_\_\_\_\_ F. 2d \_\_\_\_\_ U. S. App. D. C. (1993), slip op. decided November 23, 1993, which struck down a 6 a.m. to midnight ban on the broadcasting of "indecent" material.

The government has not demonstrated to this court the compelling nature of any interest in suppressing constitutionally protected material in order to protect an abstract privacy of the home at the expense of First Amendment rights of its inhabitants. (p. 26)

The matter now before the Commission in its Notice may be even stronger for the prohibition of restrictions on HSN stations, including KMCI, since the denial of First Amendment rights could not be predicated on such mitigating considerations as "protection of the privacy of the home".

It is beyond question that over the past decade the courts have upheld First Amendment rights with increasing frequency. U. S. v. Eichman, 496 U. S. 310 (1990), R.A.V. v. City of St. Paul, 1125 S. Ct. 2538 (1992), Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd, 112 S. Ct. 501, Longstreth v. Maynard, 961 F. 2d 895 (C. A. 10-OKl, 1992); Sample v. Borg, 675 F. Supp. 574 (E. D. Cal. 1987); Munir v. Scott, 792 F. Supp. 1477 (E. D. Mich. 1992); Rodriguez-Garcia v. Davila, 904 F. 2d 90

(CA Puerto Rico 1990). Should the Commission attempt to restrict or deny the continuation of home shopping programming, it may well run afoul of current legal thinking with respect to the First Amendment rights of broadcasters. The present climate of the courts strongly favors a hands-off attitude toward limitation of program content.

### III. Conclusion

In its Deregulation Order, released nearly 10 years ago, the Commission set forth clearly and concisely its conclusion that restrictions ("guidelines") on commercial programming were not in the public interest.

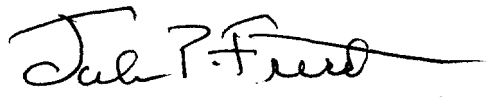
67. By our action today, the current commercial guideline is eliminated. It is our intention that this change promote licensee experimentation and otherwise increase commercial flexibility. We are taking this step because we are convinced that commercial levels will be effectively regulated by marketplace forces and because we do not believe that elimination of the guideline will otherwise harm the public interest. In sum, it seems clear to us that if stations exceed the tolerance level of viewers by adding "too many" commercials the market will regulate itself, i.e., the viewers will not watch and the advertisers will not buy time. <sup>99/</sup> (Footnote omitted)

No valid reason has arisen for overturning that conclusion. Indeed, the reimposition of restrictions on television broadcasting is contraindicated. With the proliferation of media sources since 1984, and the impending explosion of new and additional services, the "scarcity of channels" argument no longer exists. The unrestrained popular acceptance of home shopping augurs mightily

for its continuation. Unless and until the Commission is prepared to ban all commercialization on television (and radio?), it should recognize that home shopping stations have become a fixture in American viewing and American retailing, and exists as a solid expression of the public intent.

Respectfully submitted,

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